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A BASIC GUIDE TO STANDARDS OF JUDICIAL REVIEW

MARTHA S. DAVIS*

At its simplest, the phrase "standard of review" denotes the degree of deference that a reviewing court gives to the actions or decisions under review. In the alternative, the phrase describes the "positive authority which the appellate court wields in its review."[1] It defines the relationship and power shared by decisionmakers.[2]

The titles of the standards and basic definitions are deceptively simple, but because every case presents its own unique problems, attempts to apply the standards quickly become convoluted. Should an issue be treated as a unit, or should it be analyzed, layer after layer, until the component parts are reduced to absurdity? Should the overarching philosophy concentrate on the effects of review on the outcome, or should the reviewing court try to invoke the standards as pure theory? Everything here presented is an oversimplification of the review standards. The attempt here is to introduce the words and phrases encountered in standards of review opinions to establish a basic understanding of the phrases and the direction in which they should lead the reviewer. *Many* things not here considered impinge on how the standards work, such as which court is reviewing and which is reviewed, the subject of the case, and what is happening in the world politically and otherwise. For that reason, this article is not intended as a final word on any of the standards. Rather, it is intended to make court opinions dealing with the subject more understandable.[3]

I. CAVEAT—WHAT A STANDARD OF REVIEW IS NOT

Standards of review are in some ways related to standards of proof and burdens of proof but should never be mistaken for those evidentiary directives.[4] Standards of proof are concerned with the quantum and quality of proof that must be presented in order to prevail on an issue. Proof ranges

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1. 1 CHILDRESS AND DAVIS, STANDARDS OF REVIEW § 1.1, p. 4 (Wiley, 1986).

2. On quite a different level, the standard of review may also indicate the materials available to the reviewer in performing the review function and the manner in which those materials must be used. That inquiry is most often a threshold issue of review. *See* 1 CHILDRESS AND DAVIS § 1.1.

3. It is noted that courts are often themselves less than clear about which standard is being applied and the rationale behind the application. Part of the reason for this essay is to help appellate counsel make appropriate suggestions to the court on the applicability of the proper standards.

4. *See generally* 1 CHILDRESS AND DAVIS § 1.3 (cited in note 1). One of the standards of review, substantial evidence, is often used in a way that points to a quantum of evidence to indicate the basis for application of the standard. Although substantial evidence has been described as falling between "a mere scintilla" and "the weight of the evidence," both standards of proof, *see* Tibbs v.

from a "mere scintilla" through "preponderance of the evidence," and "clear and convincing" to "beyond a reasonable doubt." A burden of proof mandates who must make the proof and in what order. It has two components—the burden of production and the burden of persuasion. The burden of production requires that the person supporting a proposition come forward with some evidence of that proposition. The burden of persuasion requires a balancing of the proof presented by each side of the issue in question. To carry the burden of persuasion, the person charged with proving or disproving a proposition must present evidence which, when balanced against the proof presented by the other side, fulfills the requirements of the standard of proof applied to the particular issue (e.g., preponderance, clear and convincing, etc.).[5]

II. WHAT IS REVIEWED IN ACCORDANCE WITH THE STANDARDS?

As stated above, the primary concern of standards of review is to measure the degree of deference owed to the decisionmaker on the particular issue under review. The standards to be applied vary according to several factors. Each standard has a name or phrase intended to denote the level of deference. In order to understand where to apply those standards, some very broad delineations must be made among the kinds of standards available and among the places where the various standards are applicable. The first distinction to be made is among the types of proceedings, then among the types of issues under review, and finally among the decisionmakers. These distinctions are charted in the accompanying table and are as follows:

A. There are basically four types of proceedings:[6]
   civil
   criminal
   administrative—formal proceeding
   administrative—informal proceeding
B. There are three basic types of issues as well as one hybrid form which are subject to review:
   law
   fact
      mixed law/fact
   discretionary decisions

Florida, 457 U.S. 31, 44-45 (1982), it should not be confused with a standard of proof. *See* notes 38-51 and accompanying text.

5. Another phrase often confused, even by courts, with standard of review is "scope of review." In fact, some scholars use the terms interchangeably, and it is not necessarily incorrect to do so. In a broad sense, scope and standard of review both guide the reviewer in determining how to look at the issue on review. More technically, however, scope of review defines what is "properly subject to review on appeal," that is, the breadth of review, while standard of review defines the "depth or intensity" of review. Phillips, *The Appellate Review Function: Scope of Review*, 47 LAW & CONTEMP. PROBS. 1, 1 (Spring 1984). *See also* 1 CHILDRESS AND DAVIS § 1.3.

6. Note that some specialized proceedings are not treated in this essay, such as habeas corpus, show cause hearings, contempt, and coram nobis. Specialized proceedings should be given careful scrutiny. Many of the generalities here stated do not apply in those settings. *See, e.g.*, 2 CHILDRESS AND DAVIS §§ 7.2, 9.5, 12.7, 12.8, Chp. 13.

C. There are five kinds of decisionmakers:
jury
agency (Note that agencies occasionally conduct what appear to be criminal proceedings, or at least proceedings to which penalties may attach. Thus the table shows review standards for agency decisions on criminal proceedings; but this is *not* to say that agencies actually conduct criminal trials.)
judge (Article III *and* statutory) (Note that some judges are involved in proceedings which seem to be part of agency proceedings, i.e., the U.S. Tax Court, so that review standards are shown for judicial decisions on administrative proceedings; but this is *not* to say that judges are involved in agency decisionmaking as a general rule.)
master
magistrate

By finding the decisionmaker in the left-hand column and the decision type across the top of the table, the applicable standard of review can be identified in a very broad sense. *How* that review will be applied is a much more complex decision requiring major research efforts before any definitive statement can be made.

III. WHAT ARE THE STANDARDS?

As the table indicates, there are basically six standards[7] which can be placed on a spectrum from no deference under de novo review to complete deference under no review. The standards are:

de novo review[8]
clearly erroneous review (*not* for agency decisions)[9]
reasonableness review, which includes substantial evidence review or sufficiency of the evidence review[10] which includes the rational basis test (for agency decisions on questions of law)[11]
arbitrary & capricious review (for agency decisions)[12] which includes the clear error of judgment test[13]
abuse of discretion review[14]
no review[15]

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7. Other names for standards are often encountered in opinions. Usually, those standards are actually particular applications of one of the six listed standards. (As, e.g., rational basis review or kid glove review used in administrative law to denote an unusually deferential application of substantial evidence review). *See, e.g.*, 2 CHILDRESS AND DAVIS §§ 15.10, 15.11.

8. *See* 1 CHILDRESS AND DAVIS § 2.14; 2 CHILDRESS AND DAVIS § 15.2. *See* notes 28-29 and accompanying text.

9. *See* 1 CHILDRESS AND DAVIS §§ 2.2-2.12; 2 CHILDRESS AND DAVIS §§ 10.3, 15.3. *See* notes 30-37 and accompanying text.

10. *See generally* 1 CHILDRESS AND DAVIS, Chp. 3; 2 CHILDRESS AND DAVIS, Chp. 9, §§ 15.4, 16.2, 16.7. *See* notes 38-51 and accompanying text.

11. *See* 2 CHILDRESS AND DAVIS §§ 15.10, 17.2.

12. *See* 2 CHILDRESS AND DAVIS §§ 15.7, 15.9, 16.4, 16.8. *See* notes 52-60 and accompanying text.

13. *See* 2 CHILDRESS AND DAVIS § 15.6.

14. *See generally* 1 CHILDRESS AND DAVIS, Chp. 4, §§ 5.8, 5.11; 2 CHILDRESS AND DAVIS, Chp. 11, §§ 7.6, 15.8, 15.9, 17.3. *See* notes 61-64 and accompanying text.

15. *See* 2 CHILDRESS AND DAVIS §§ 14.14-14.19. *See* notes 65-70 and accompanying text.

IV. THE TOUGH QUESTIONS

It is apparent from the differentiations made in the table and in the lists, that trying to determine which standard to apply in which situation raises a number of very difficult issues, including:

A. How to distinguish among fact, law, discretion, and mixed questions.[16]

B. How to determine, as a threshold matter, the scope of the issue being reviewed[17]—that is, is the question under consideration "did defendant receive effective assistance of counsel?" or is it "did counsel fail to cross-examine?" The first question would be a mixed question of law/fact; the second would be purely a factual question and would be reviewed under a different standard. In some situations, the scope of the issue being reviewed is clear. In many situations, however, the petitioner can encourage the reviewing court to use a particular standard by the manner in which the issue is stated. *Great* care should be exercised in the initial statement of the issues on appeal.

C. Along the spectrum of standards from de novo to no review, some issues fall near the lines where different standards intersect. The difference in deference accorded between, for example, clearly erroneous and substantial evidence review is often quite vague if the issue is one which does not clearly belong in a particular category.[18]

V. DEALING WITH THE LAW/FACT DISTINCTION

An initial and very difficult problem in determining the application of standards of review is the problem of the law/fact distinction. This distinction is made even more difficult by the fact that it is not merely a dual problem of law versus fact, but a spectral problem of law, fact, and mixed questions of fact and law, plus the possibility of a discretionary decision (where the differences between law and fact are generally not important). On questions of fact, the reviewing court usually asks whether the decision is *reasonable*. On ques-

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While "no review" is arguably not a true standard of review (that is, it is a threshold issue; where complete deference must be given, there is no standard applied at all), it does form one end of the deference spectrum and is here treated as a standard.

16. *See generally* 1 CHILDRESS AND DAVIS §§ 2.17-2.21; 2 CHILDRESS AND DAVIS §§ 7.5, 17.1.

17. *See* 1 CHILDRESS AND DAVIS §§ 2.20-2.21; 2 CHILDRESS AND DAVIS §§ 7.5, 9.4.

18. *See generally* 1 CHILDRESS AND DAVIS, Chp. 6, §§ 2.8, 4.21; 2 CHILDRESS AND DAVIS § 7.5. Of course, in the best of situations, it is sometimes difficult to distinguish clearly between clearly erroneous review and substantial evidence (reasonableness) review. The review is of the same type of decision but is undertaken by a different decisionmaker. That is the clearest differentiation between the two standards. Application of the standards is not so plain. Broadly stated, when applying clearly erroneous review, the reviewing court may reverse if it is convinced that, despite evidence to support the conclusion below, the conclusion nevertheless has been made by mistake. When applying substantial evidence or reasonableness review, the reviewing court may not reverse unless, considering the evidence, the conclusion is an unreasonable or unreasoned one. Thus, in clearly erroneous review, attention is focused on the conclusion: Even if the conclusion is a reasonable one considering the evidence, the reviewer may reverse if the conclusion, though reasonable, is mistaken. In substantial evidence review, attention is focused on the support for the conclusion: Taking all the evidence into account, if the conclusion could be reasoned from that evidence, the reviewer may not reverse despite its conviction that a mistake has been committed. Though the differences are difficult to state clearly, courts seem to have a good feel for what is involved in each.

tions of law, it asks whether the decision is *correct*. On discretionary decisions, it usually asks whether the decision is *legal* in the sense of being within the prescribed boundaries which define the area of discretion. Thus, the decision whether the issue is fact, law, mixed, or discretionary can be decisive on appeal.

The line-drawing can also be important in another arena which is really a substantive rather than a review inquiry, but which is often discussed in the same way. The additional question decided on the basis of the law/fact line-drawing is whether an issue must be submitted to the jury.[19] This law/fact distinction is of particular importance in criminal appeals because of the constitutional right to a jury trial. The problem usually arises when a trial court removes a fact-finding decision from the jury under the mistaken impression that it is a question of law, by instructing the jury that a fact is true "as a matter of law." Because a plea of not guilty puts almost everything in issue—even the most patent and uncontested truth—no fact in such circumstances may be decided by the judge to the exclusion of the jury—to do so is to direct a verdict as to that issue. A directed verdict does not exist in a criminal trial. If the issue removed from the jury is, for example, an element of the crime charged, then the jury cannot properly find the defendant guilty because it has made no fact finding as to a necessary element of the crime.

It is one of the earliest truisms given to law students that the jury judges the facts and the judge determines the law. That is true as a general principle, but it is not the entire story. It leaves the impression that juries are not judges of the law at any time or in any sense. Juries are always judges of the law in the sense that juries must pass on the manner and extent to which the law expounded by the judge fits the facts brought out in the evidence. This process requires juries to perform the legal function of interpretation and application. Thus, in the criminal law concept of the general verdict, the jury is required to make a legal determination. *Guilty* and *not guilty* are quintessentially questions of the application of law to factual determinations. The judge instructs the jury on what the law is; the jury decides the facts and determines whether, under those facts, the defendant comes within the definition or legal instruction given by the judge.

But, as to the jury, fact decisions and decisions on application of law get the same standard of review—reasonableness—though likely it will be called sufficiency of the evidence on questions of application of law and substantial evidence on questions of fact.[20] When the *trial court* is making such determinations, however, the review standards to be applied to the decisions are different as between issues of law and issues of fact. The trial court's determinations of law are, in general, reviewed under a de novo standard. As a general principle, its determinations of fact in criminal cases get two different standards—guilt-related fact findings[21] are reviewed under a substantial

19. *See* 2 CHILDRESS AND DAVIS § 7.5, pp. 16-18.
20. *See* 2 CHILDRESS AND DAVIS §§ 9.1-9.3.
21. Guilt-related fact findings include such findings as whether the defendant tried to withdraw

evidence or reasonableness standard and non-guilt-related fact findings[22] are reviewed under the clearly erroneous standard.[23]

Some courts are adopting a spectrum approach in the close-question choices between what is law and what is fact.[24] That is, there are questions which are purely fact questions (what Mary did yesterday); there are questions that are purely law questions (what does the statute mean); and there are questions that involve the application of law to fact (or mixed questions—was Mary's act a violation of the statute). Those issues which reach the reviewing court tend to be largely in the gray area of mixed law/fact questions. The Ninth Circuit Court of Appeals, in addressing this issue, has said:

> The appropriate standard of review for a district judge's application of law to fact may be determined, in our view, by reference to the sound principles which underlie the settled rules of appellate review .... If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject [the judge's] determination to deferential, clearly erroneous review [as a fact question]. If on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to de novo review [as a law question].[25]

The court further stated that most debatable questions will come down on the law end of the spectrum,[26] which is of course the problem with this spectrum approach—it tends to encourage the reviewing court to view most issues as questions of law since that finding allows for more intensive appellate review. The spectrum approach is characteristic of one of two prevailing views of the treatment of mixed questions. The first view, a unified approach (which includes the spectrum analysis just described), allows a one-step, simplistic finding: where an issue contains elements of both fact and law, the court reviews *the* mixed question broadly under a de novo standard, freely substituting its judgment for that of the lower court. That is, where the issue is viewed as a single entity, a single "mixed" issue, it is reviewed in the same way as is a pure question of law and de novo or independent review is utilized. Thus, doubtful calls are decided by the reviewing court.

The second of the two approaches for delineating mixed questions is ex-

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from a conspiracy or whether he entered a premises without permission. Guilt-related fact findings are, in other words, the same fact findings which a jury would be required to make in order to determine whether defendant is guilty or not guilty.

22. Non-guilt-related fact findings include such matters as whether the defendant was advised of his right to counsel or was given required warnings of the effect of pleading guilty. The difference in standard applied to guilt-related and non-guilt-related fact findings probably arises from a desire to avoid punishing or hampering the defendant in his choice between trial by jury or by court. If the reviewing court gave a more deferential review to guilt-related findings by a jury than it did to such findings by a court, then the defendant would be ill-advised to choose trial by jury.

23. *See generally* 2 CHILDRESS AND DAVIS, Chp. 10.

24. *See* 1 CHILDRESS AND DAVIS §§ 2.13, 2.18, 3.9; 2 CHILDRESS and DAVIS § 7.5. *See also, e.g.*, Miller v. Fenton, 474 U.S. 104 (1985); United States v. McConney, 728 F.2d 1195 (9th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 824 (1984).

25. *McConney*, 728 F.2d at 1202.

26. *Id.*

pressed as a two-step analysis which focuses on the lower decisionmaker's conclusion as a process rather than as a single issue.[27] A reviewing court utilizing this kind of analysis views the mixed law/fact determination as being composed, first, of the underlying factual findings (Mary did A, B, and C) and factual inferences or fact conclusions deduced therefrom (thus Mary intended D), and, as to that part of the determination, the court is bound by the review appropriate for such fact findings. The second part of the determination is the legal conclusion reached by the decisionmaker below based upon the decided factual data (Mary violated the statute). That part of the issue is reviewed as a question of law. This two-step analysis has the effect of simplifying the inquiry by dividing it and then applying standards which are clearly appropriate to the two separated parts. Courts feel more confident applying appropriate review to matters which can be clearly delineated as law or fact, rather than applying law question review to the whole issue which is concededly at least partly fact. This analysis is *not* uniformly applied by the courts, however, and care must be taken either to apply the formulation adopted by the court or, if arguing for adoption of one of the forms of analysis, to be very tactful in extolling its virtues.

VI. THE STANDARDS

While each separate standard of review is quite complex and, in applying any standard, extensive inquiry should be made to differentiate the nicer points of meaning, a basic understanding of each standard is initially necessary. This review of the various standards is intended to provide only the broadest overview.

A. *De Novo Review*

A question of law may be decided de novo. Appellate courts are first and foremost law courts, and the lower decisionmaker's conclusions of law do not, in theory at least, bind the reviewing court. The idea behind de novo review is that the reviewing court accords the decisionmaker no particular deference. That is, the reviewing court is charged to make an independent determination of the issues. In civil and criminal proceedings, de novo review supposedly takes place only when the issues are *not* pure fact issues. Thus de novo review connotes the reviewing court's power to come to a decision that differs from that of the decisionmaker below, but usually based on that decisionmaker's fact record.[28] In some administrative proceedings, on the other hand, the reviewing court may be allowed by statute to review both law and facts de novo. Where the court is reviewing administrative fact findings de novo, it can do so on the basis of the agency record, or it can, when appropriate, create its own

27. *See* 1 CHILDRESS AND DAVIS § 2.18; 2 CHILDRESS AND DAVIS § 7.5. *See also, e.g.*, Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 666 (5th Cir. 1983).

28. A magistrate's decision may be reviewed at the district or trial court level by creating a new record.

record.[29]

Even law questions are not absolutely reviewed anew under the de novo standard in the sense of making an original appraisal of all evidence. Rather, when the court reviews de novo, it reviews only those portions of the record relevant to the legal question at issue, and it is also guided by a general presumption of regularity, by comity, and by an implicit tendency to affirm (based on trust in the decisionmaker below).

B. *Clearly Erroneous Review*

The Supreme Court defined clearly erroneous review in *United States v. United States Gypsum Co.*[30] The Court stated, "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[31] That definition has been refined to add that where the evidence will support either of two permissible conclusions, a trial judge's choice between the two cannot be clear error.[32] Further, the reviewing court may not reject the trial court's fact findings solely because the reviewing court might have come to a different conclusion on the same evidence. Clearly erroneous review requires substantial, but not total, deference to the fact findings of the trial court.[33]

This standard is not properly applied to anything except the fact findings of judges, masters, and sometimes magistrates. Fact findings of juries and administrative agencies receive reasonableness or substantial evidence review, not clearly erroneous review.

Gypsum mandates a reviewing court's consideration of the *entire record* when determining clear error.[34] This rule recognizes the fact that a finding *can* be clearly erroneous even when supported by substantial evidence. Opinions occasionally state that findings supported by substantial evidence *cannot* be clearly erroneous. This is simply wrong.[35] On the other hand, while it is probably true that findings that are *not* supported by substantial evidence *are* clearly erroneous, the tests really should have nothing to do with each other. The substantial evidence test is applied in a different setting (to jury and agency findings and to a judge's guilt findings) than the clearly erroneous standard (to a judge's fact findings) and tying the two together is inappropriate.

Some courts will seek to differentiate fact findings based on paper or doc-

29. *See* 2 CHILDRESS AND DAVIS § 15.2.
30. 333 U.S. 364 (1948).
31. *Id.* at 395.
32. United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949).
33. *See* 1 CHILDRESS AND DAVIS § 2.5.
34. *Gypsum*, 333 U.S. at 395.
35. *See* 1 CHILDRESS AND DAVIS § 2.7 at 45 n.53 and cases there cited. *Note particularly* Ridgway v. United Hosp., 563 F.2d 923 (8th Cir. 1977), *compared to* Jackson v. Hartford Accident & Indem. Co., 422 F.2d 1272 (8th Cir. 1970) (Lay, J., concurring), *cert. denied* 400 U.S. 855 (1970), indicating that the distinction troubles some appellate judges.

umentary evidence from those based on credibility.[36] The clearly erroneous standard applies in either event, and there is no principled reason why the manner in which the standard is applied should be different in the two situations. Decisions of reviewing courts, however, are founded on fact and reality. Judges, consciously or unconsciously, may view certain findings with more deference due to the lower court's on-the-spot assessment of believability. Other findings, based on paper or documentary facts, may be viewed as not requiring the protection given to credibility findings because they are completely reassessable by the reviewing court. Thus, practitioners need to consider the type of evidence at trial and tactfully make clear to the appellate court whether the finding is one which likely ought to receive superior deference. Likewise, when a court adopts the fact findings proposed by the opposing party, it may help to respectfully imply that the appellate court may have a certain amount of freedom in applying the clearly erroneous rule that might not have been available had the trial court made its own independent fact findings.[37]

C. *Reasonableness or Substantial Evidence or Sufficiency of the Evidence Review*

The seventh amendment provides that no fact tried by a jury shall be reexamined in any court other "than according to the rules of the common law."[38] This forms the basis for the highly deferential attitude of the courts in reviewing jury fact findings and other jury decisions. The court is allowed only a narrow survey of the evidence upon which the jury based its decision. Whether that evidentiary basis is sufficient to support the verdict is tested by a *reasonableness* standard. Generally stated, the test is: Could reasonable minds have reached the conclusion expressed by the jury in its verdict? The verdict must stand unless appellant can show that there is no substantial evidence to support it, considering the evidence in the light most favorable to the verdict and with all reasonable inferences deducible from the evidence drawn in support of the verdict.[39] Courts may state this standard in several different ways. It may be stated as a reasonableness test (Could reasonable minds have reached the conclusion expressed by the jury in its verdict?), as a substantial evidence test (The verdict of the jury must be sustained if there is substantial evidence to support it, taking the view most favorable to the verdict.) or as a sufficiency of the evidence test in criminal trials (Is the evidence adduced at

36. *See* 1 CHILDRESS AND DAVIS § 2.9.

37. *Id.*

38. U.S. CONST. AMEND. VII.

39. Note that in criminal verdicts, the jury does not have the *right* to reach a not guilty verdict where there is *no* substantial evidence or other evidence to support that verdict, but it has the *power* to do so. This is not because of some different review standard but because the *not guilty* verdict receives no review at all. Thus, the fact that the jury has not conformed to the sufficiency of the evidence or substantial evidence standard is not reversible because it is not reviewed. *See* 2 CHILDRESS AND DAVIS § 9.13.

trial sufficient to support a rational determination of guilty beyond a reasonable doubt?).

These various tests appear to mean the same thing so far as the deference to be given to the decision is concerned.[40] However, one reason to use the various statements of the standard is to indicate that "substantial evidence" or "reasonableness" or "sufficiency" concern both a quantitative and a qualitative measure of the evidence. In criminal matters, the standard is to indicate the court's obligation to make reasonable inferences and to sustain those credibility choices which support the jury's verdict.[41]

Reasonableness/substantial evidence/sufficiency is a more deferential standard of review than clearly erroneous or de novo review. The standard simply requires evidence which a reasonable mind might accept as adequate to support a conclusion—i.e., evidence which has substance and meaning.[42] It is not the *amount* of evidence but its overall believability which is important in applying this standard. The *quantitative* aspect of the test is subsumed in the basic question on review—was the evidence such that the verdict was reasonable?[43]

In administrative proceedings, substantial evidence can be more or less deferential than in civil and criminal matters. Some agencies or subagencies are perceived by reviewers as performing certain of their functions in an adjudicatory manner similar to the manner in which a court performs.[44] Review of those decisions, therefore, is much like a review of court decisions. In those situations the application of substantial evidence review closely tracks clearly erroneous review. In other situations, where the reviewer's perception is that the agency is not performing in a court-like manner, the reviewing court gives greater deference to agency expertise, the complexity of the issues before the agency, the clarity of the agency's statutory directives, etc. This review more nearly tracks the reasonableness/substantial evidence review accorded to jury findings.[45]

Another powerful difference between application of this standard to administrative proceedings, as opposed to jury situations, is the frequent application of the standard to statutory interpretation, policy statements, and other issues of law or discretion, as well as the usual application to fact findings.[46] The application of the standard in this manner is necessary in the administrative setting because such decisions often are indistinguishable from questions of fact, particularly when the procedure under review is rulemaking rather than adjudication.[47] Because the rulemaking procedure of administrative

40. It appears that the label applied varies according to the identity of the decisionmaker rather than the issue, although no court has definitively so held. *See* 2 CHILDRESS AND DAVIS § 9.3.

41. *See* 2 CHILDRESS AND DAVIS §§ 9.1-9.3.

42. *See* 2 CHILDRESS AND DAVIS § 9.3.

43. *Id.*

44. This is sometimes based simply on past practice or because a provision of the agency's enabling act so provides. *See* 2 CHILDRESS AND DAVIS § 16.1.

45. *See* 2 CHILDRESS AND DAVIS § 15.4, p. 273.

46. *See* 2 CHILDRESS AND DAVIS §§ 17.2-17.4.

47. *See* 2 CHILDRESS AND DAVIS §§ 16.2-16.6.

agencies more nearly resembles the process of legislating than the process of adjudicating, courts feel less competent to judge the agencies' decisionmaking process and often give them even more deference than is accorded to juries.[48] When the reasonableness/substantial evidence standard is applied to statutory interpretation or policymaking, the terms "rational basis review" or "hard look review" are often used as an indication of the court's attitude about agency expertise. These are not really separate standards but particular *kinds* of substantial evidence review.[49]

Substantial evidence review is provided in the Administrative Procedures Act[50] as the standard for reviewing more formal agency actions, whether rulemaking or adjudication, which produce a fairly formal, trial-type record, indicating that the agency has a provable basis for the decision. Thus, the actual position on the spectrum of reasonableness/substantial evidence/sufficiency review depends on which kind of proceeding is being reviewed and the identity of the decisionmaker.

It has been suggested that reviewers are tending toward a unified standard for the fact findings of all non-judge decisionmakers.[51] If that prediction is accurate, the unified standard likely will be reasonableness/substantial evidence/sufficiency review.

D. *Arbitrary and Capricious Review*

The arbitrary and capricious standard is set out in the Administrative Procedures Act.[52] The standard was developed with particular reference to agency fact finding and policy choices made in an informal setting which produces little in the way of a record. The standard was once applied so deferentially as to constitute almost no actual review. As long as any state of facts could be imagined which would justify the decision, the existence of such facts was presumed and the action was sustained.[53] However, the courts were not satisfied with that kind of rubber-stamping and soon began to alter the application of the test. This occurred at about the same time that the courts began to require either a record or at least an explanation from the agencies detailing what they had considered in making the decision at issue. As agencies were required to produce more in the way of a record of informal proceedings, arbitrary and capricious review moved closer to substantial evidence review and became less deferential to the agency.[54] In other words, although the

48. *See* 2 CHILDRESS AND DAVIS § 15.4.

49. *See* 2 CHILDRESS AND DAVIS §§ 15.9, 15.10, 16.6.

50. The Administrative Procedures Act appears at 5 U.S.C. §§ 551-559 and 701-706 (1985). The provision for substantial evidence review appears at 5 U.S.C. § 706(2)(E).

51. *See* 2 CHILDRESS AND DAVIS § 15.7, 289-93. *See also* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.7, at 356 (2d ed. 1984); B. SCHWARTZ, ADMINISTRATIVE LAW §§ 10.13-10.37 (2d ed. 1984); R. PIERCE, S. SHAPIRO AND P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS § 7.3.3, at 363 (1985).

52. 5 U.S.C. § 706(2)(A) (1985).

53. Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935), *citing* Borden's Farm Prods. Co. v. Baldwin, 293 U.S. 194, 209 (1934).

54. *See* 2 CHILDRESS AND DAVIS § 15.7.

review was still deferential, the agency *was* required to show a basis for its decision. Once that basis was shown, however, any rational decision arising from that basis would be sustained.[55]

A subset or element of arbitrary and capricious review is the "clear error of judgment" test. This phrase was introduced in *Citizens to Preserve Overton Park v. Volpe*,[56] and is mentioned because the name sounds very much like clearly erroneous review. No relation in fact exists between the clear error of judgment test and clearly erroneous review.[57] Lately, reviewing courts have increasingly set out the clear error of judgment test as a test of *trial court* discretionary or fact finding decisions ("we cannot say that we are left with the definite and firm conviction that the district court committed a clear error of judgment . . ."). [58] When reviewing courts do this, they are mixing unrelated standards. Clear error of judgment is simply and only an element of the arbitrary and capricious standard of review.

Some scholars believe that arbitrary and capricious review and substantial evidence/reasonableness review are identical.[59] There is a difference, however, in *what* is being reviewed.[60] In substantial evidence review, the review encompasses the agency's assessment of the evidence in the record and its application of that evidence in reaching a decision. In arbitrary and capricious review, the focus is on the agency's explanation or justification of its decision and whether that decision can be reasoned from the body of evidence. There is little scrutiny of the actual process of assessment by the agency in applying arbitrary and capricious review. As time passes, these two standards may in fact become synonymous.

E. *Abuse of Discretion Review*

Discretionary decisions are the most difficult to review or even to discuss. There are many decisions by judges and by administrators which are "within the sound discretion of the decisionmaker." A judge, in supervising his court, the progress of the trial, the litigation process, and the general operations of the judicial system, is making discretionary decisions.[61] Likewise, the administrator in nearly all nonfactual decisions, is given the discretion to exercise judgment which, if legal, is protected.[62] This is the most deferential standard of review available with the exception of no review at all. The difficulty in

55. *Id.*
56. 401 U.S. 402, 416 (1971).
57. *See* 2 CHILDRESS AND DAVIS § 15.6.
58. In re Plywood Antitrust Litig., 655 F.2d 627, 638 (5th Cir. 1981), *cert. dism'd*, 462 U.S. 1125 (1983). *See also, e.g.*, 999, a Corp. v. CIT, 776 F.2d 866 (9th Cir. 1985); Matter of Klein, 776 F.2d 628 (7th Cir. 1985); Union Oil Co. v. Service Oil Co., 766 F.2d 224 (6th Cir. 1985); Kern v. TXO Prod., 738 F.2d 968 (8th Cir. 1984).
59. *Supra* note 51.
60. *Id. See, e.g.*, Christian Broadcasting v. Copyright Royalty Tribunal, 720 F.2d 1295, 1304 (D.C. Cir. 1983), *and* Marshall v. Knudson Construction Co., 566 F.2d 596, 600-01 (8th Cir. 1977), indicating an application of arbitrary and capricious review and substantial evidence review to different aspects of the same decision.
61. *See generally* 1 CHILDRESS AND DAVIS, Chp. 4; 2 CHILDRESS AND DAVIS, Chp. 11.
62. *See* 2 CHILDRESS AND DAVIS §§ 15.8, 17.3.

considering whether the decisionmaker has abused its discretion arises because there are many kinds of exercises of discretion, some of which are so constricted by "guidelines" or "ways to decide" that it is stretching the word to even call them discretionary. Other exercises of discretion have so few guiding principles that a finding of abuse is very unlikely if the decisionmaker is careful not to exceed the scope of the discretionary authority granted. Some discretionary decisions are protected because no one cares enough to challenge them, but where discretionary decisions are challenged, the usual object of the reviewing court is to contain and confine the exercise of discretion within constitutional and statutory limitations and within whatever guiding principles are set out by rules or custom.[63]

There are some fundamental differences between exercises of judicial discretion and exercises of administrative discretion. For example, administrative discretion is often exercised in a collegial manner (decision by a body of several people rather than a single judge) and thus simply may not be available for review of the actual decisionmaking process—the process *cannot* be explained because no single person knows exactly how it took place.[64] Also, the discretion may be exercised in an area with which the reviewing court has little or no familiarity and so cannot make the same kind of assessment of the exercise of discretion as it could make with an act of judicial discretion. These differences often mean that, although the language used to describe review may be identical, the actual review applied to judicial exercises may be less deferential than that applied to administrative exercises.

F. *No Review*

At the far end of the spectrum is the situation in which there is simply no review of the decision below—complete deference. This of course is mostly limited to administrative proceedings.[65] Some statutes simply preclude review of certain agency decisions, such as Veterans Administration benefits decisions[66] and Title II Social Security claims,[67] while other statutes are "drawn in such broad terms" that there is "no law to apply" to agency decisions.[68] Moreover, the courts have created some nonreviewable decisions, such as prosecutorial decisions *not* to prosecute or agency decisions *not* to act.[69] However, a total failure of review is rare. For example, constitutional issues almost always can be reached by a reviewing court regardless of whether review is precluded. Thus, if the governing statute says no review, courts may find ways to circumvent it.[70]

63. *See* 1 CHILDRESS AND DAVIS § 4.1; 2 CHILDRESS AND DAVIS § 7.6.
64. *See* 2 CHILDRESS AND DAVIS § 15.8.
65. A jury finding of not guilty is also unreviewable.
66. 38 U.S.C. § 211(a) (1970).
67. 42 U.S.C. § 405(h) (1983).
68. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).
69. There appear to be some exceptions to the issue of non-reviewability. *See* Dunlop v. Bachowski, 421 U.S. 560 (1975); 2 CHILDRESS AND DAVIS §§ 14.18-14.19; *but see* Heckler v. Chaney, 470 U.S. 821 (1985), for the Supreme Court's statement of presumptive unreviewability.
70. *See* 2 CHILDRESS AND DAVIS §§ 14.14-14.19.

VII. PRACTICAL CONSIDERATIONS

The most important consideration, from the beginning of any case, is that the appellate court can only review that which is before it.[71] If counsel does not include an issue in the record, there is nothing to review. From the moment the case is undertaken, counsel should be preparing for appeal. This is particularly important in administrative matters where the informality of the initial hearing may lead counsel into inattention. Even when an attorney walks into the hearing room and the Administrative Law Judge, sitting there in shirtsleeves, says "Hi, I'm Bill," the attorney should never let herself forget that she is preparing a record for the United States Supreme Court. She must be familiar with the appellate rules, the standards applied in reviewing acts of the court, counsel, agency, parties, and the requirements for preparing an adequate record. Check carefully on the development of the record. In court, check the case docket sheet frequently (daily during trial) to be sure that everything needed is getting into the record. In administrative proceedings, most agencies keep a file contents sheet which includes a short description of everything in the file. Many agencies do not keep a verbatim record of hearings. You should be certain that all important parts of the testimony are included in the record either in pre-hearing submissions or afterwards in the form of a letter or memo to the Administrative Law Judge.

When preparing the appellate brief, decide whether the issues on review are fact, law, mixed, or discretionary. If that can't be determined, review other cases for similar substantive issues where a decision has been made. If the cases don't indicate anything about the problem at hand, then argue for the characterization which will mean a review that will be most helpful. Don't make frivolous arguments about the character of the issue, but as stated above, there is a wealth of widely-varied opinion on how certain issues should be characterized—make use of that.

VIII. TWO-TIERED REVIEW

The question often arises how a second-level appellate court, such as the United States Supreme Court, reviews an intermediate appellate review of a trial court or agency decision. The short answer is, it's difficult to determine. On the one hand, the Supreme Court has said on several occasions that its review function as to Circuit Courts of Appeals decisions is limited to the correction of gross errors in application of the standard of review by the Court of Appeals.[72] What the Supreme Court seems most often to *do* however is to go through the Court of Appeals decision in order to re-review the trial court or agency decision and determine from that whether the Court of Appeals review was right or wrong. In other words, the Supreme Court appears to fully substitute its judgment for that of the Court of Appeals. In a way, how-

71. *See* 1 CHILDRESS AND DAVIS § 3.16; 2 CHILDRESS AND DAVIS §§ 11.36, 11.37.

72. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951); NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502 (1951); Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974).

ever, this makes sense because application of the standard of review is a pure question of law. Thus, logically, the Supreme Court could be *sub-silencio* applying de novo review to the pure law question of application of the standard of review, making full substitution of judgment appropriate. In any event, the case can be made either for the proposition that the Supreme Court should re-review the trial court decision to determine whether the Court of Appeals has acted properly, or that the Supreme Court should limit its review to the actual application of standards by the Court of Appeals without a direct re-review of the trial court decision. The argument chosen should depend on whether the Supreme Court's attention should be concentrated on the Court of Appeals decision or on the trial court or agency decision.

IX. CONCLUSION

At its clearest level, a standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review. Alternatively, it describes the authority of the reviewing court to determine the severity of error in the decision of the lower court or agency, and whether that error reaches a reversible level. Basically, the notion of standards of review is to define the relationship and power shared among decisionmakers. That does not mean, however, that the court or agency below has done something wrong. Rather, it connotes that it has assessed its own or another's authority incorrectly.

A thoughtful consideration in the appellate brief of the appropriate standard of review may determine the outcome of an appeal. Only a poorly prepared brief will fail to consider the standard of review with the same care as is given to facts and substantive law.